IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

JACOB VIGIL Plaintiff, vs. JOHN KIRSZENBERG Defendant.	CASE NO. 2022 CV 32 JUDGE BECKY L. DOHERTY MAGISTRATE CHAD HAWKS **MAGISTRATE'S DECISION**

This matter came before the Magistrate for a bench trial on August 31, 2022. The Plaintiff, Jacob Vigil did not appear and was not represented by counsel. Plaintiff's claims had previously been dismissed by the Portage County Municipal Court for failure to prosecute. Defendant John Kirszenberg appeared and was represented by attorneys Ray Weber and Laura Gentilcore.

During pre-trial litigation, Plaintiff Vigil failed to respond to Requests for Admission served by Defendant's counsel. Accordingly, the questions were deemed to be admitted as true and were entered into the record for purposes of the trial.

FINDINGS OF FACT

1. Kirszenberg is the owner of the federally registered word service mark "JONAH THE SCIENTIST," said mark having Reg. No. 6,332,250, and stating a date of first use and first use in commerce of April 21, 2016.
2. Kirszenberg is the owner of the federally registered design plus word service mark "JONAHTHESCIENTIST," said mark having Reg. No. 6,146,294, and stating a date of first use and first use in commerce of October 21, 2016.

3. Kirszenberg is the owner of the federally registered word service mark "FLAT EARTH LUNACY," said mark having Reg. No. 6,260,545, and stating a date of first use and first use in commerce of March 29, 2017.
4. Kirszenberg has used and is using his three federally registered service marks in connection with online journals, namely blogs, featuring science that argues the Earth is a globe and not flat.
5. Vigil was observed by Kirszenberg to publish on social media flat earth and other hypotheses, some of the time under his own name, other times under the alias "Tim Ozman."
6. One of Vigil's social media sites is named "Infinite Plane Society."
7. Kirszenberg, as JonahTheScientist, has published information on his blog, "FlatEarthLunacy," challenging statements made by Vigil on his site "Infinite Plane Society," as well as similar statements made by others on their respective websites.
8. After Kirszenberg published information on his blog challenging statements made by Vigil, Vigil without the consent of Kirszenberg, obtained the Twitter address: https://twitter.com/jonah_Scientist.
9. After Kirszenberg published facts challenging statements made by Vigil, Vigil, without the consent of Kirszenberg, also obtained the domain name www.jonahthescientist.com.
10. The Twitter address and domain name adopted and used by Vigil are the same as the federally registered word service marks of Kirszenberg.
11. Kirszenberg owns Copyright Registration No. VA0002203608 for the artwork associated with the design plus word service mark JONAHTHESCIENTIST, of which Kirszenberg is the owner and author.

12. After Kirszenberg published information challenging statements made by Vigil, Vigil began using the scientist character and associated artwork of which Kirszenberg is the author and copyright owner, and did so without the consent of Kirszenberg, in order to sell products on his website.
13. After Kirszenberg published information challenging statements made by Vigil, Vigil began to personally attack Kirszenberg and his family online via various websites and through email. For example, Vigil published articles on a website titled "Serial Killer Jonah Kirszenberg Murders Male Boys in Ohio" and "John Kirszenberg and 6 Others in Ohio Arrested in Childporn Sting." Vigil also published photoshopped pictures alleging that Kirszenberg is a pedophile. For example, one image depicts Kirszenberg standing next to political consultant John Podesta, (who is alleged to be a pedophile and child abuser), with the label "Pedo" inserted over the image.
14. Vigil has similarly published statements and graphics about Kirszenberg's adult daughter.
15. Kirszenberg's claims he suffers from anxiety and high blood pressure because of Vigil's antics.
16. As a result of the failure to respond to Defendant's First Set of Requests for Admission, requests 1-46 are admitted and established as fact for purposes of the trial.

CONCLUSIONS OF LAW

Defendant's counterclaim alleges the following causes of action: 1) Trademark Infringement/Unfair Competition; 2) Copyright Infringement; 3) Trade Libel/Defamation; 4) Intentional Infliction of Emotional Distress.

TRADEMARK INFRINGEMENT/UNFAIR COMPETITION

To establish trademark infringement under 15 U.S.C. §1114, a party must show that : 1) it owns a valid trademark; 2) the opposing party used the trademark "in commerce" without the owner's authorization; 3) the opposing party used the owner's trademarks, or an imitation thereof, "in connection with the sale, offering for sale, distribution, or advertising" of goods and services; and 4) the opposing party's use of the trademark(s) is likely to cause consumer confusion. *The Ohio State Univ. v. Skreened Ltd.,* 16 F. Supp.3d 905, 910 (S.D. Ohio 2014) (citing 15 U.S.C. §1114).

During the trial, Kirszenberg proved that he owns three valid trademarks, Vigil has used and is using the trademarks, or imitations thereof, in commerce without Kirszenberg's authorization. Further, Vigil has used Kirszenberg's trademarks or imitations thereof, in connection with the sale, offering of sale, distribution, or advertising of goods and services. Vigil's use of these trademarks is likely to cause consumer confusion. *The Ohio State Univ. v. Skreened Ltd.*, 16 F. Supp.3d 905, 910 (S.D. Ohio 2014) (citing 15 U.S.C. §1114).

In *Frisch's Rests., Inc. v. Elby's Big Boy,* the Sixth Circuit Court of Appeals set out eight factors that are relevant to make a showing that the infringer's mark will create a likelihood of confusion with the senior mark owner's goods or services. In this case, the evidence showed that many of the factors, including, identity of blogging services; similarity of the marks; similarity of online marketing channels; and circumstantial evidence of Vigil's intent in selecting his domain names based on timing of introduction and content. As a result, Vigil's willful use of Kirszenberg's three federally registered service marks constitutes trademark infringement under 15 U.S.C. §1114.

Under the Lanham Act, the same test is used for trademark infringement and unfair competition, i.e., likelihood of confusion. *Audi AG v. D'Amato,* 469 F.3d 534, 542 (6th Cir. 2006)

(citing *Two Pesos v. Taco Cabana, Inc.*, 505 U.S. 763, 780, 112 S.Ct. 2753, 120 L.Ed.2d 615 (1992)). As such, Vigil's use of Kirszenberg's trademarks is also unfair competition under the Lanham Act.

Ohio's common law trademark infringement claims are similar in that they also require proof of likelihood of confusion. *Mister Twister, Inc. v. JenEm Corp.*, 710 F.Supp. 202, 204 (S.D.Ohio 1989). As such, Vigil's use of Kirszenberg's trademarks is unfair competition under Ohio common law. Additionally, Ohio's statutory claim for unfair competition or deceptive trade practices under R.C. 4165.02 is the same as that for an unfair competition claim under the Lanham Act. *Microsoft Corp. v. McGee,* 490 F.Supp.2d 874, 880-81 (S.D.Ohio 2007) (citing *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 920 (6th Cir. 2003)) (other citations omitted). Under Ohio statute, Vigil's use of the trademarks is unfair competition or deceptive trade practices.

Section 1116 defines "counterfeit mark" as "a mark that is registered on the principal register in the United States Patent and Trademark Office for such goods or services sold, offered for sale, or distributed and that is in use, whether or not the person against whom relief is sought knew such mark was so registered." 15 U.S.C. §1116(d)(1)(B)(i). Elsewhere, the statute provides additional clarification, defining "counterfeit" as "a spurious mark which is identical with, or substantially indistinguishable from, a registered mark." 15 U.S.C. §1127.

In this case, Vigil has used marks identical with or substantially indistinguishable from Kirszenberg's three federally registered service marks. In relation to the "JONAH THE SCIENTIST" mark, the Court counted 10 instances where Vigil used the mark, which includes the webpage and the online shop. Relating to "JONAHTHESCIENTIST" with artwork, the Court found four instances where the mark was used in the online shop and one instance with the Facebook page, for a total of 5 instances. Relating to the "FLAT EARTH LUNACY" mark, the

Court counted two instances of use - one time in the online shop and one time on Facebook. Pursuant to 17 U.S.C. 1117(c), Kirszenberg's election of statutory damages entitles him to anywhere between $1,000.00 and $200,000.00 per mark used.

Accordingly, Kirszenberg is granted judgment in his favor against Vigil on the claim of trademark infringement/unfair competition. Kirszenberg is awarded $17,000.00 in statutory damages. Further, pursuant to 15 U.S.C. 1117, Kirzenberg is entitled to recover Vigil's profits, if any. Therefore, Vigil is ordered to provide an accounting to Kirszenberg of any sales and profits relating to the goods offered for sale at the web address/URL https://infinateplane.shop/collections/jonah-the-scientist-online-shop and jonahthescientist.com/blogs/news/dinosaurs-and-educational-products-by-jonah-the-scientist, using Kirszenberg's registered marks. Under 15 U.S.C. 1117, Kirszenberg is entitled to an award of attorney's fees in the amount of $30,000.00. Finally, Vigil is hereby ordered to cease using Kirszenberg's three federally registered trademarks, including that he shall stop using the domain www.jonahthescientist.com. If Vigil fails to comply with this order within 30 says of filing, Kirszenberg may present a copy of this order to the domain registry for purposes of procuring their take-down.

COPYRIGHT INFRINGEMENT

To establish copyright infringement, the claimant must prove ownership of a valid copyright and copying of constituent elements of the work that are original. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991); *Stromback v. New Line Cinema*, 384 F.3d 283, 293 (6th Cir.2004) (citing *Feist*, 499 U.S. at 361, 111 S.Ct. 1282). "Originality, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some

minimal degree of creativity." *Feist*, 499 U.S. at 345, 111 S.Ct. 1282. "The requisite level of creativity is extremely low," *Id.*

In this case, Kirszenberg presented evidence that he owns a valid copyright certificate and is the author of the "Jonah the Scientist" character in combination with the associated artwork. Further, Vigil willfully used said copyrighted character and associated artwork after registration in his online shop (Defendant's Exhibit E). The remaining uses of the scientist character are permissible uses under 15 U.S.C §1115. Specifically, the Court counted four instances in the online shop and one instance on the Facebook page. Pursuant to 17 U.S.C. 504, Kirszenberg's election of statutory damages entitles him to anywhere between $750.00 and $30,000.00 per copyright violation.

Kirszenberg is granted judgment on his copyright infringement claim against Vigil. Kirszenberg is awarded $5,000.00 in statutory damages. Further, Vigil is hereby ordered to cease using Kirszenberg's federally copyrighted artwork.

DEFAMATION

"The elements of the common-law action of defamation are (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Weber v. Ferrellgas, Inc.*, 2016-Ohio-4738, 68 N.E.3d 207, ¶ 42 (11th Dist.); also *Hahn v. Kotten*, 43 Ohio St.2d 237, 243, 331 N.E.2d 713 (1975).

An alleged defamatory written statement that imports a charge of an indictable offense involving moral turpitude or infamous punishment or tends to injure a person in his trade or occupation or tends to subject a person to public hatred, ridicule, or contempt, is actionable *per*

se. Watley v. Ohio Dept. of Rehab. & Corr., 10th Dist. Franklin No. 07AP-902, 2008-Ohio-3691. When a statement is found to be defamatory *per se*, both damages and actual malice are presumed to exist. *Knowles v. Ohio State Univ.*, 10th Dist. Franklin No. 02AP-527, 2002-Ohio-6962.

In this case, Vigil posted articles and pictures calling Kirszenberg a serial killer, rapist, and pedophile, among other things (Defendant's Exhibits E & F). These publications were published to various audiences on internet webpages. Further, these allegations import a charge of an indictable offense, thereby making them defamatory *per se*.

There was no evidence to a reasonable degree of certainty regarding special or economic damages relating to Vigil's defamatory statements. However, Kirszenberg's testimony provided sufficient evidence for non-economic damages. It is clear the comments of Vigil created mental anguish, feelings of humiliation, and anxiety with Kirszenberg. Accordingly, **the Court grants judgment in favor of Kirszenberg and awards $500.00 in non-economic damages**. Further, Vigil is ordered to remove the pedophile post/meme on Pinterest and the following posts: "Serial Killer Jonah Kirszenberg Murders Male Boys in Ohio;" "John Kirszenberg and 6 Others in Ohio Arrested in Childporn Sting;" "Dr. John Kirszenberg Shoots Eleven People in New Orleans;" and any other references to Kirszenberg being a pedophile, serial killer, or rapist.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

"In a case for intentional infliction of emotional distress, a plaintiff must prove (1) that the defendant intended to cause the plaintiff serious emotional distress, (2) that the defendant's conduct was extreme and outrageous, and (3) that the defendant's conduct was the proximate cause of plaintiff's serious emotional distress." *Weaver v. Deevers*, 11th Dist., 2021-Ohio-3791, 180 N.E.3d 619, ¶ 33, quoting *Phung v. Waste Mgt., Inc.*, 71 Ohio St.3d 408, 410-11, 644 N.E.2d

286 (1994). "Whether conduct rises to the level of "extreme and outrageous" conduct constitutes a question of law." *Krlich v. Clemente*, 2017-Ohio-7945, 98 N.E.3d 752, ¶ 26 (11th Dist.), quoting *Jones v. Wheelersburg Local School Dist.*, 4th Dist. Scioto No. 12CA3513, 2013-Ohio-3685, 2013 WL 4647645, ¶ 41.

In this case, there is little evidence that Vigil intended to cause Kirszenberg serious emotional distress. Whether the insults or toxic comments were intended to cause harm to Kirszenberg or to entertain other individuals/followers on the internet is unclear.

Assuming arguendo that Vigil did in fact intend to cause serious emotional distress to Kirszenberg, the Court does not find that the conduct was extreme and outrageous. To determine if the conduct was extreme and outrageous, an average member of the community would view the behavior as going beyond all bounds of decency, atrocious, and utterly intolerable in a civilized community, where the facts would arouse an onlooker to exclaim "outrageous!" *Mender v. Chauncey*, 2015-Ohio-4105, 41 N.E.3d 1289, (4th Dist). Vigil's comments and pictures are within the context of an internet spat between two parties that hold deeply held beliefs on whether the earth is a round globe or a flat infinite plane. Individuals on the internet trying to assert dominance over another rarely follow the same couth and decorum as a debate at the Oxford Union. Indeed, a 5-minute scroll on Twitter or another social media platform proves the point.

Accordingly, **Kirszenberg's claim for intentional infliction of emotional distress is dismissed. The Court grants judgment in favor of Vigil.**

CONCLUSION

Accordingly, judgment is granted in favor of Defendant John Kirszenberg on his claims for trademark infringement, copyright infringement, and defamation.

Judgment is granted in favor of Plaintiff Vigil on Defendant Kirszenberg's intentional infliction of emotional distress claim.

Kirszenberg is entitled to money damages in the amount of $22,500.00 for all claims. Kirszenberg is also awarded $30,000.00 in attorney fees and injunctive relief as specified above.

Costs to Plaintiff.

Pursuant to Civ. R. 53(D)(3)(a)(iii), a party shall not assign as error on appeal the Court's adoption of any factual finding or legal conclusion unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ. R. 53(D)(3)(b).

The Clerk is directed to serve upon all parties notice of this decision and this date of entry upon the journal in accordance with Civ. R. 53, in the manner provided in Civ. R. 58.

SO ORDERED.

MAGISTRATE CHAD HAWKS

This Order or Decision was mailed by ordinary mail/fax/e-mail to attys/parties by the clerk on 1/31

Jill Fankhauser, Clerk of Courts

By EM Deputy Clerk